RESPONSE OF CAROLINA,
Plaintiff-Appellee,

v.

LEASCO RESPONSE, INCORPORATED et al.,
Defendants-Appellants.

RESPONSE OF CAROLINA, INC.,
Plaintiff-Appellee,

v.

LEASCO RESPONSE, INCORPORATED, et al.,
Defendants-Appellants.

DATATRON CORPORATION, d/b/a
Response of Louisville,
Plaintiffs-Appellees,

v.

LEASCO RESPONSE, INCORPORATED et al.,
Defendants-Appellants.

Nos.73-3362, 73-4008, 73-4009.

United States Court of Appeals,
Fifth Circuit.
July 31, 1974.

Franchisees of computer centers brought actions against franchisor for violation of antitrust laws and one franchisee sought preliminary injunction prohibiting franchisor from prosecuting further its state court action seeking unpaid royalties and rentals and possession of leased

computer equipment. Second franchisee sought preliminary injunction prohibiting any actions by franchisor resulting in termination of its business. The United States District Court for the Southern District of Florida, C. Clyde Atkins, J., issued the requested preliminary injunctions and the franchisor appealed. The Court of Appeals, Tuttle, Circuit Judge, held that where contract provisions on which franchisor sued in state court did not further alleged anticompetitive practices, franchisees were not entitled to preliminary injunctions prohibiting franchisor from prosecuting state court actions againt franchisees.

Reversed and remanded.

1. Monopolies †21.1(1)

When conduct actually prohibited by antitrust laws is sought to be enforced in a state court action, antitrust defense is valid block to the action. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 4; Clayton Act, § 16, 15 U.S.C.A. § 26.

2. Monopolies †21.1(1)

Where recovery sought in state or federal court proceeding is premised on an obligation collateral to but independent of agreement which allegedly violates antitrust laws and it is not necessary to depend on or enforce an agreement violative of the antitrust laws in order to grant the requested relief, suit is not barred on theory that agreement is violative of the antitrust laws. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 4; Clayton Act, § 16, 15 U.S.C.A. § 26.

3. Courts †508(2)

If contract provisions sued on in state court by party who is a defendant in a separate antitrust action do not embody or further anticompetitive practices challenged in the antitrust action, there has been no irreparable loss or damage from alleged violation of antitrust laws and federal court in which the antitrust action has been brought may not issue a preliminary injunction against prosecution of the state court action. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 4; Clayton Act, § 16, 15 U.S.C.A. § 26.

4. Courts †508(2)

Franchisees which brought antitrust actions against franchisor of computer centers and which alleged that clause of franchise agreement imposed an illegal territorial restraint and that franchisor discriminated against franchises in favor of centers owned by franchisor were not entitled to preliminary injunctions prohibiting franchisor from prosecuting actions against franchisees in state courts to recover royalties and equipment rentals under franchise and lease agreements and possession of leased equipment where monies sought by franchisor were not due under the clause challenged in the antitrust actions. Sherman Anti-Trust Act, §§ 1, 4, 15 U.S.C.A. §§ 1, 4; Clayton Act, § 16, 15 U.S.C.A. § 26; 28 U.S.C.A. § 2283.

* * *

John R. Kelso, Harold L. Ward, Miami, Fla., Morton L. Ginsberg, New Cork City, for defendants-appellants.

Joseph W. Womack, J. Kirk Wood, Miami, Fla., for plaintiffs-appellees.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

TUTTLE, Circuit Judge:

Appellant-defendant, Leasco Response, Inc. (Leasco), appeals the issuance of preliminary injunctions in these consolidated cases by the district court as requested by appellees-plaintiffs, Response of Carolina (Carolina) and Datatron Corporation (Datatron). The injunctions grew out of anti-trust actions filed by Carolina and Datatron against Leasco.

FACTS

Carolina, a North Carolina corporation, and Datatron, a Kentucky corporation, entered into contracts with Leasco, one consisting of a franchise agreement involving certain computer programing (software) and the other a computer equipment lease (hardware). The franchise agreement committed Carolina and Datatron to pay to Leasco a franchise fee and royalty payments equal to 15% of their gross receipts. The equipment lease provided for a monthly rental charge with additional maintenance costs. Carolina ceased, on approximately April, 1972, and Datatron on approximately July, 1973, making rental and royalty payments to Leasco. Shortly after each franchisee terminated contractual payments, they filed the instant suits against Leasco alleging violations of the Sherman and

Clayton Acts and certain state laws. One anti-trust allegation charges an illegal territorial restraint in the form of a contract provision requiring a 70% royalty on sales made by the franchisee outside of its primary area of responsibility. The second contends that Leasco discriminates against Carolina and Datatron, as franchisees, in favor of Leasco's company-owned computer centers (preferential dealings).

On the day prior to Carolina's filing its action, Leasco brought suit on the contractual agreements in the state courts of North Carolina seeking the unpaid royalties and rentals and the recovery of possession of the leased computer equipment. Carolina maintains that the contracts are void under the federal anti-trust laws[1] and, therefore, unenforceable. The Antitrust laws vest exclusive anti-trust jurisdiction in the federal courts, 15 U.S.C.A. § 4. For that reason, a defense based on federal antitrust laws cannot be litigated in the state court action filed by Leasco. As part of its relief in the anti-trust action, therefore, Carolina sought a preliminary injunction against Leasco from prosecuting further the state court suit, alleging that its successful effect would be to end Carolina's business.

As part of its relief, Datatron also sought an injunction to block any actions by Leasco which would result in the termination of its business. No suits were pending by Leasco against Datatron at the time of the hearing on the preliminary injunction.

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[1]See section 1 of the Sherman Act, 15 U.S.C.A. §1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The district court agreed with Carolina and Datatron, and issued the requested injunctions. In Carolina's suit, the court prohibited Leasco from prosecuting the state court action and interfering with the ordinary course of Carolina's business.[2] In Datatron's suit, the court enjoined Leasco

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[2]The pertinent part of the injunction reads:

"The Defendant, Leasco Response, Inc., it's retainers, attorneys, officers, agents, servants, employees and all others in active concert or participation with said Defendant, to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained until further order of the Court from:

A) Further prosecuting or calling on for hearing, any motion or other application in Cause No. 73 — CVS 8500 styled:

Leasco Response, Inc.

vs.

Response of the Carolinas Inc., et al

now pending in the Superior Court of Mecklenburg County, North Carolina, which motion or prosecutorial application has as its object either the securing of a money judgment by Leasco against Response or the repossession of computer hardware, attachments, parts, or components which are by their nature essential to the continuing operation of Plaintiff's business.

b) Doing any act or thing the effect or probable fruition of which will disturb the status quo of the described State Court litigation in Mecklenburg County pending further order of this Court or any transferee court.

c) Disconnecting, interrupting or otherwise rendering inoperative, interstate telephone trunks, lines, cables or other links between Plaintiff's business and Leasco's computers at Bethesda, Maryland or elsewhere.

d) Threatening, intimidating, obstructing, or in anywise interfering with the officers, agents, and employees of the Plaintiff, Response of Carolina, Inc. in the ordinary and customary course of its business activities.

e) Enticing, threatening or intimidating Plaintiff's customers in any way. The Court intends that Leasco and those acting for it refrain from further soliciting Plaintiff's customers away, from telephoning, writing or otherwise contacting the Plaintiff's present customers in pursuit of any objective to encourage said customers not to do business with the Plaintiff for whatever reason, and from calling or writing Plaintiff's customers advising them that the Plaintiff will go out of business or cease operations on a date certain, or other like conduct."

from failing to perfrom any act under the contracts and from removing any equipment from Datatron's possession.[3] Leasco appeals from the issuance of these preliminary injunctions.

In sum, Leasco challenges the injunctions on the grounds that enjoining the state court action in the Carolina suit and apparently prohibiting the institution of any state court action in the Datatron suit (1) have no legal basis under anti-trust law, specifically, 15 U.S.C.A. § 26,

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[3]The pertinent part of the injunction reads:

"The Defendant, LEASCO RESPONSE, INC., its retainers, attorneys, officers, agents, servants, employees and all others in concert or participation with said Defendant to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained under further order of the Court from:

1. Failing or refusing to perform or do any act, deed or thing under any contract or obligation between it and the Plaintiff.

2. Removing any equipment, components or parts (hardware) from the Plaintiff's possession, control, custody or property.

3. From harassment, interruption, or interferring with Plaintiff, its employees or business operations in any way. The Court also intends that no such acts be done by the Plaintiff toward the Defendant.

4. From refusing within five (5) days to deliver the two drives (described by the witnesses at the hearing) upstairs to the Plaintiff's equipment room. In this connection and in keeping with the Defendant's request, Plaintiff may if it desires cause the drives to be moved from storage to the described location, the Defendant to bear the costs of same.

5. From failing or refusing to properly disconnect the computers components and parts (hardware) now in the possession of the Plaintiff, preparatory to the Plaintiff's move to new premises; such move now contemplated to take place on or about December 1, 1973.

6. From failing or refusing to properly connect and render operational the computers, parts components (hardware) after the Plaintiff has moved to its 'new' premises or quarters.

7. From refusing to deal with the Plaintiff or do other business pending the conclusion of the above styled litigation."

and are not valid under the legal standards governing the granting of preliminary injunctions; and (2) are prohibited by the anti-injunction statute, 28 U.S.C.A. § 2283.[4]

15 U.S.C.A. § 26 AND PRELIMINARY INJUNCTIONS

Injunctive relief is provided as a remedy by law in anti-trust suits, 15 U.S.C.A. § 26. This provision states:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue."

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[4]Of course, the injunction in the Datatron suit would not trample on the dictates of section 2283 against enjoining state proceedings. The Supreme Court explained in Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), that section 2283, is not a bar to a federal injunction preventing the institution of state court proceedings, but only prohibits stays of pending suits. See Barancik v. Investors Funding Corp., 489 F.2d 933 (7th Cir. 1973).

The above statutory provision also incorporates the standards for issuing a preliminary injunction established by equity. These were set out by this Court in Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572-573 (5th Cir. 1974):

> ". . . It [the district court] must exercise that discretion in light of what we have termed 'the four prerequisites for the extraordinary relief of preliminary injunction.' Allison v. Froehlke, 5 Cir. 1972, 470 F.2d 1123, 1126. The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. DiGiorgio v. Causey, 5 Cir. 1973, 488 F.2d 527; Blackshear Residents Organization v. Romney, 5 Cir. 1973, 472 F.2d 1197."

Measured under these principles and the case law and implications flowing from the Supreme Court's decision in Bruce's Juices v. American Can Co., 330 U.S. 743, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947), and Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959), we find that the district court's injunctions cannot stand, because there was no irreparable loss or damage caused by a violation of the federal anti-trust law.

The appellees' position, in which the district court concurred, is that the franchising and leasing agreements violate the anti-trust law and are invalid. Since Leasco is suing on these contracts in state court where there is no jurisdiction to grant the relief mandated by the anti-trust law, the district court enjoined the pending state court proceeding against Carolina and the institution of a state court suit against Datatron, because irreparable injury would be accomplished by effectively terminating Carolina's and Datatron's businesses. There is, however, an erroneous assumption in appellees' and the district court's syllogism. The Supreme Court postulated in Bruce's Juices and Kelly, and lower courts developed the rule,[5] that the anti-trust laws on the theory asserted by appellees, void for illegality, provide no defense for actions under state law for collection of debts for sale of goods and services.

In Bruce's Juices, a suit filed in state court, the issue squarely presented to the Supreme Court was whether "notes representing the purchase price of goods sold and delivered are uncollectible if it is found that the vendor violated the Robinson-Patman Act." 330 U.S. at 744, 67 S.Ct. at 1015. The Supreme Court assumed that the anti-trust violations were established and held that Congress had not meant to provide the additional remedy requested of allowing "a buyer to get his goods for nothing because

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[5]Denison Mines, Ltd. v. Michigan Chemical Corp., 469 F.2d 1301, 1309 (7th Cir. 1972); El Salto, S.A. v. P.S.G. Co., 444 F.2d 477, 482-483 (9th Cir.), cert. denied, 404 U.S. 940, 92 S.Ct. 273, 30 L.Ed.2d 253 (1971); Dickstein v. DuPont, 443 F.2d 783, 785-787 (1st Cir. 1971); Sunshine Packers, Inc. v. American Can Co., 395 F.2d 86 (5th Cir. 1968); Lewis v. Seanor Coal Co., 382 F.2d 437, 441 (3rd Cir. 1967), cert. denied, 390 U.S. 947, 88 S.Ct. 1035, 19 L.Ed.2d 1137 (1968).

the seller violated the Act . . ." 330 U.S. at 752, 67 S.Ct. at 1019. Likewise, in Kelly a similar effort to assert an antitrust defense to a suit filed in federal court for debt on goods sold and delivered was attempted; the Supreme Court reaffirmed the Bruce's Juices holding:

> "As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court.
>
> * * *
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> "In any event, an analysis of the narrow scope in which the defense is allowed in respect of the Sherman Act indicates that the principle of distinction is not what the petitioner claims it to be. The leading case here in which the defense was allowed is Continental Wallpaper Co. v. Lewis Voight & Sons Co., 212 U.S. 227, [29 S.Ct. 280] [53 L.Ed. 486,] much relied on by petitioner. There the Voight Company had made purchases from Continental, a corporation which existed only as a selling agent for numerous wallpaper companies doing business in a pool and selling at prices, alleged to be excessive and unreasonable, fixed through the pool agreement. The Court was of the opinion that to give judgment for the excessive purchase price so fixed in favor of such a vendor would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act. 212 U.S. at 261, [29 S.Ct. 280]. . . . Past the point where the judgment of the

> Court would itself be enforcing this precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' Continental Wallpaper v. Lewis Voight & Sons Co., supra, at 271 [29 S.Ct. 280.] (dissenting opinion). Supplying a sanction for the violation of the Act, not in terms provided and capricious in its operation, cf. Bruce's Juices, Inc. v. American Can Co., supra, [330 U.S.] at 753-754, [67 S.Ct. 1015], is avoided by treating the defense as so confined." 358 U.S. at 518, 520-521, 79 S.Ct. at 431, 432.

[1, 2] Both Bruce's Juices[6] and Kelly[7] carve out an exception under Continental Wallpaper Co. v. Lewis Voight & Sons Co., 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486 (1909), that when the conduct actually prohibited by the anti-trust act is sought to be enforced in a state court action, the anti-trust defense is a valid block.[8] In sum, where recovery in the state court proceeding (or a federal court proceeding) is premised on an obligation collateral to but independent of the agreement which violates the anti-trust law and where it is not necessary for the state

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[6]330 U.S. at 754-755, 67 S.Ct. 1015.

[7]358 U.S. at 520-521, 79 S.Ct. 429.

[8]See Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971); Sunshine Packers, Inc. v. American Can Co., supra, 395 F.2d 86; Farbenfabriken Bayer, A. G. v. Sterling Drug Co., 307 F.2d 207, 208-210 (3rd Cir. 1962).

court in granting relief to depend on or enforce the agreement violative of the anti-trust provisions, there is no illegality to bar the state suit.[9]

[3, 4] Having discovered that appellees' theory cannot provide a defense to the state court action, unless the Voight exception is met, the question next becomes whether a preliminary injunction can issue under this theory of illegality.[10] We think not. Helfenbein v. International Industries, Inc.,438 F.2d 1068 (8th Cir. 1971); Red Rock Cola Co. v. Red Rock Bottlers, 195 F.2d 406 (5th Cir. 1952). But cf. Milsen Co. v. Southland Corp., supra, 454 F.2d 363. If the contract provisions sued on in the state court do not embody or further the anti-competitive practices, then there has been no irreparable loss or damage from a violation of the anti-trust law.

The Helfenbein case involves facts very similar to the present situation. There was a franchise agreement between the parties which provided for the subleasing of restaurants and equipment, just as here Leasco is leasing computer and related equipment to Carolina and Datatron. Upon default

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[9]The franchise agreement expressly provided for severability of any clause held to be invalid. Superior Bedding Co. v. Serta Associates, Inc., 353 F.Supp. 1143 (N.D.Ill. 1972). In Kelly, the Supreme Court found that the provision in the commodity sales contract, where the buyer and seller illegally agreed not to sell on the future's market, was separable from the contractual promise to pay for the commodities. 358 U.S. at 516-517, 521, 79 S.Ct. 429. Cf. Lewis v. Seanor Coal Co., supra, 382 F.2d 437.

[10]The difference between prohibiting this defense as a total block to a state court suit as in Bruce's Juices, and, in this case, enjoining the state proceedings until the end of the federal action, is not sufficient to distinguish this situation. The injunction here was issued on the basis and reasoning which was rejected in Bruce's Juices and Kelly.

by the franchisees, the franchisor commenced eviction proceedings in state court. The franchisees then, just as in this case, filed anti-trust suits under the Sherman and Clayton Acts in federal court against the franchisor (alleging illegal tying agreements) and sought a preliminary injunction from the federal court staying the state court eviction actions. Relying on Bruce's Juices and Kelly, the court found no loss or damage by a violation of the anti-trust laws as required by 15 U.S.C.A. § 26 and affirmed the denial of the injunctive relief.

There are two important reasons for narrowly construing, as the court did in Helfenbein, the plea of illegality under the anti-trust laws. First, as stressed heavily by the Supreme Court in Bruce's Juices and Kelly, the availability of such a defense allows contracting parties the benefits of a contract without having to tender consideration. In this case, Carolina and Datatron have accepted from Leasco the use of their computer hardware, their computer software, and their reputation and expertise, without payment. "The Court has refrained from extending judicial sanction to the avoidance of private contracts where to do so is unnecessary. See Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-757, 67 S.Ct. 1015, 91 L.Ed. 1219 (1947); D. R. Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U.S. 165, 35 S.Ct. 398, 59 L.Ed. 520 (1915); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 22 S.Ct. 431, 46 L.Ed. 679 (1902)." Dickstein v. DuPont, supra, 443 F.2d at 786.

Second, the policy expressed in Bruce's Juices and applied in Kelly denoted that the enumerated statutory remedies in the anti-trust law do not provide for or require

such a broad anti-trust defense to contract actions. To allow the appelles to obtain free goods and services from Leasco as a compensatory measure in the state court and, additionally, to award triple damages in the federal anti-trust suit would exceed the redress established by the anti-trust statute. 330 U.S. at 756-757, 67 S.Ct. 1015.[11]

Nor can the injunctions be upheld under the Voight exception. The substantial amounts owed Leasco by appellees[12] are not argued to be monies due from appellees under the 70% clause for selling outside their territories of primary responsibility (territorial restraint),[13] rather the record reflects that appellees terminated all payments. Neither the rentals on the leased computer hardware nor the maintenance costs nor the unchallenged 15% royalties were paid. The appellees contend that to dissolve the injunctions would allow Leasco to put them out of business. We note,

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[11]In other words, for any damage inflicted by Leasco on Carolina and Datatron which terminates their businesses, which Carolina and Datatron can demonstrate violates the anti-trust law, triple damages can be claimed in the anti-trust suit.

[12]Approximately $86,000 is owed by Datatron and $267,406 by Carolina.

[13]The record reveals that, at least from Datatron, Leasco never received the 70% of the sales receipts for business outside appellees primary area of responsibility. The record does not indicate whether in the state suit against Carolina, Leasco is claiming this 70%. In any event, we note that the Supreme Court in Bruce's Juices refused the illegality defense even though part of the money sought by the seller represented an illegal differential in the price of the goods. See Helfenbein v. International Industries, Inc., supra, 438 F.2d at 1071.

however, that this situation is not one of a franchisor terminating a franchisee because of its failure to comply with the practices violative of the anti-trust law,[14] nor that the alleged anti-trust violation so permeated the franchise agreement that to uphold any of its provisions would be to countenance and enforce an anti-trust violation.[15] Finally, the dictates of Bruce's Juices and Kelly were applied in Helfenbein even though it was clear that the effect there was to terminate the franchisee's business.

In addition, the principles of comity and federalism recognized by this Court in Red Rock Cola Co. v. Red Rock Bottlers, supra, 195 F.2d 406, and affirmed in American Radio Association v. Mobile Steamship Association, Inc., 483 F.2d 1, 6-7 (5th Cir. 1973), mitigate against unnecessarily interfering with pending state court proceedings.[16] Red Rock involved a question similar to the issue in

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[14]Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968); Broussard v. Socony Mobil Oil Co., 350 F.2d 346 (5th Cir. 1965); Bergen Drug Co., Inc. v. Parke, Davis & Co., 307 F.2d 725 (3rd Cir. 1962); Bateman v. Ford Motor Co., 302 F.2d 63 (3rd Cir. 1962).

[15]See Milsen Co. v. Southland Corp., supra, 454 F.2d 363.

[16]The decision in Mitchum v. Foster, 407 U.S. 225, 243, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), indicated that the restraints of federalism and comity were still present even if an injunction fell within an exception to 28 U.S.C.A. §2283. See note 16, infra.

this case, whether an injunction could issue under the anti-trust laws to enjoin a state court suit. This Court reversed the issuance of the preliminary injunctions on the grounds of federalism and comity.[17]

We conclude, therefore, that the judgment granting the preliminary injunctions must be set aside.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

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[17]Having determined that the injunctions are invalid under 15 U.S.C.A. §26 and the principles governing the granting of injunctions, there is no necessity to reach the question of whether the anti-trust laws constitute an exception to the anti-injunction statute, 28 U.S.C.A. §2283. Carolina had contended that the enjoining of the state court in North Carolina fell within the exception language in 28 U.S.C.A. §2283, either as "necessary in aid of jurisdiction," Atlantic C. L. R. Co. v. Engineers, 398 U.S. 281, 294-296, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), or as "expressly authorized by Act of Congress," Mitchum v. Foster, supra, 407 U.S. at 228, 92 S.Ct. at 2154; Jennings v. Boenning & Co., 482 F.2d 1128 (3rd Cir. 1970), cert. denied, 414 U.S. 1025, 94 S.Ct. 450, 38 L.Ed.2d 316 (1973).

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EDWARD W. WADSWORTH, Clerk

OFFICE OF THE CLERK
600 Camp Street
New Orleans, La. 70130

October 8, 1974

TO ALL COUNSEL OF RECORD

RE: 73-3362 RESPONSE OF CAROLINA V. LEASCO RESPONSE INCORPORATED

73-4008 RESPONSE OF CAROLINA, INC. V. LEASCO RESPONSE

73-4009 DATATRON CORPORATION V. LEASCO RESPONSE INCORPORATED

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDARD W. WADSWORTH
CLERK

By /s/ Anne G. Parent
Deputy Clerk

cc: Messrs. John R. Kelso
Harold L. Ward
Mr. Morgan L. Ginsberg
Mr. J. Kirk Wood
Mr. Joseph W. Womack

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 73-1082-Civ-CA

RESPONSE OF CAROLINA, INC.,
a North Carolina corporation,

Plaintiff,

vs.

LEASCO RESPONSE, INC.,
a Delaware corporation;
JOHN DOE, TOM DOE, SAM DOE, and
RICHARD ROE,

Defendants.

PRELIMINARY INJUNCTION WITH FINDINGS AND CONCLUSIONS

This cause is before the Court after notice on the application of the Plaintiff, Response of Carolina, Inc. for a provisional and preliminary status quo order enjoining the Defendant, Leasco Response, Inc. and its retainers from further interfering with Plaintiff's business operations or customers at Charlotte, North Carolina or elsewhere and from pursuing for the time being at least, its present efforts to repossess certain computer hardware and components which are necessary and essential to Plaintiff's business operations.

The action of the Court today implies further inquiry and consideration pendente lite of the propriety and wisdom of dissolution, modification or the making permanent of this writ.

The Court has prior to its oral ruling from the bench and the issuance of this order, considered the pleadings and motions filed, the exhibits and documentary evidence offered, the pertinent antitrust Acts, Section 2283 of the Code, Rules 65 and 52(a) among others and the oral testimony of the witnesses John Wright and Joseph Mummaw. Further consideration has been given to the argument of counsel for both parties and to the cases cited both in the brief and in the argument. Being advised in the premises and in consequence of the proofs and authorities, the Court finds and concludes:

First: That as to prehearing notice, counsel for the Defendant, Leasco in both Charlotte and Miami were notified. As to the former, Mr. Hamrick of Fairley, Hamrick, Montieth & Cobb was notified by long distance telephone. As to the latter Mr. Ward of Fowler, White, Humkey, Burnett, Hurley & Banick, P.A. was given written notice and appeared for Leasco at the hearing.

Second: That as to the basic issue of entitlement to relief, the equities are with the Plaintiff. This conclusion is reached by the Court with due regard to the quantum and quality of the evidence required prior to the entry of restraint orders.

Third: Without regard to the ancillary or pendent jurisdictional counts of the complaint, the Court con-

cludes that, with reference to the antitrust allegations, there is a reasonable probability Plaintiff will succeed on the merits of it's claim.

Fourth: Given the decisions and the Restraint of Trade Acts which vest exclusive antitrust jurisdiction in the Federal judiciary, the Court concludes that the State court cannot for want of such jurisdiction grant the relief which is indicated and is necessary in the case at bar.

Fifth: The granting of restraint will minimally damage the Defendant. In this connection the Court has duly considered the relationship of the parties, one to the other, and the time sequence of Leasco's belated efforts to repossess its computer hardware.

Sixth: Unless restrained the Defendant's present course of action toward and against the Plaintiff will substantially and irreparably damage the Plaintiff's business and very existence.

Seventh: The effectiveness of this injunctive order is conditioned upon the Plaintiff's posting of a good and sufficient bond with the Clerk of Court in the amount of One Thousand Dollars ($1,000.00). In the event that Plaintiff shall post the described bond in cash, the Clerk shall receive the same and give a receipt therefor.

Eighth: The drawing down of all or any part of the bond or monies described in Seventh above shall be done only under the terms of a written order of the Court after hearing.

Ninth: The entry of this order shall not be construed to foreclose or prejudice any future hearing of consideration by the Court of a motion to transfer under 1404(A).

Tenth: The entry of this order shall not be construed to foreclose or prejudice any future hearing or consideration by this Court or any transferee court to dissolve, modify or make permanent this writ.

Eleventh: The parameters of this writ do not include the Judge or Judges of the General Court of Justice — Superior Court Division — Mecklenburg County of the State of North Carolina nor its authority and nothing contained in my order is to be construed to in anywise impose restraint on said officials.

The reasons, authorities and conditions imposed, it is now thereupon ordered adjudged and decreed that:

The Defendant, Leasco Response, Inc., it's retainers, attorneys, officers, agents, servants, employees and all others in active concert or participation with said Defendant, to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained until further order of the Court from:

a) Further prosecuting or calling on for hearing, any motion or other application in Cause No. 73-CVS 8500 styled:

Leasco Response, Inc.
vs.
Response of the Carolinas Inc. et al

now pending in the Superior Court of Mecklenburg County, North Carolina, which motion or prosecutorial application has as its object either the securing of a money judgment by Leasco against Response or the repossession of computer hardware, attachments, parts, or components which are by their nature essential to the continuing operation of Plaintiff's business.

b) Doing any act or thing the effect or probable fruition of which will disturb the status quo of the described State Court litigation in Mecklenburg County pending further order of this Court or any transferee court.

c) Disconnecting, interrupting or otherwise rendering inoperative, interstate telephone trunks, lines, cables or other links between Plaintiff's business and Leasco's computers at Bethesda, Maryland or elsewhere.

d) Threatening, intimidating, obstructing, or in anywise interfering with the officers, agents, and employees of the Plaintiff, Response of Carolina, Inc. in the ordinary and customary course of its business activities.

e) Enticing, threatening or intimidating Plaintiff's customers in any way. The Court intends that Leasco and those acting for it refrain from further soliciting Plaintiff's customers away, from telephoning, writing or otherwise contacting the Plaintiff's present customers in pursuit of any objective to encourage said customers not to do business with the Plaintiff for whatever reason, and from calling or writing Plaintiff's customers advising them that the

Plaintiff will go out of business or cease operations on a date certain, or other like conduct.

Done and ordered at Miami, Florida this 16 day of July, 1973, nunc pro tunc as of 7:02 P.M., Friday, July 13, 1973.

/s/ CHARLES B. FULTON
Chief UNITED STATES
DISTRICT JUDGE
for C. CLYDE ATKINS

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 73-1082-Civ-CA

RESPONSE OF CAROLINA, INC.
a North Carolina corporation

v

LEASCO RESPONSE, INCORPORATED,
a Delaware corporation, et al.

Filed Nov 30 1973

ORDER OF MODIFICATION

FINDINGS AND CONCLUSIONS

THIS CAUSE is before the Court on the Petition of the Defendant, Leasco Response, Inc. to vacate or modify the Temporary Injunction heretofore issued as of July 13, 1973. The Court has now conducted three evidentiary hearings in these consolidated causes, which hearings were concerned with the propriety of the granting of injunctive relief and the balancing of the interests of the parties pendente lite. The pleadings and admitted documents of evidence have been considered as well as the testimony given on oath before the Court. The Court has reviewed and reconsidered the Code provisions of 2283, the applicable antitrust Acts; the briefs of counsel the cases cited by counsel for both sides; the representations made by Mr. Leonard Pernick, the President of Leasco; by Mr.

Harold Ward, as counsel for the defendant; by Mr. Joseph Womack, as counsel for the plaintiffs. The court notes that neither side impugns the correctness of any of the representations made to the Court. The Court has duly taken note of the changes in the financial position of the plaintiff since the hearing of July 13, 1973. Being advised in the premises, the court now finds and concludes:

First: The Court has jurisdiction of the cause and the parties thereto.

Second: With due regard to the provisions of Section 2283 of Title 28, the Court is authorized to employ injunctive relief in aid of its exclusive jurisdiction in anti-trust cases.

2. That portion of the defendant's Petition which asks amendment or modification of the writ is granted to the degree and extent as follows:

(a) Beginning October 20, 1973 and on the same day of each month thereafter, plaintiff shall deposit into the Registry of the Court fifteen percent (15%) of its total net revenue from whatever source derived and without regard to any territorial or geographical limitation. Net revenue means all monies received during the month preceding the month such payment is due. The monthly deposit as described here shall be suitably noted as applying against the claim of royalty payments.

(b) Beginning November 1, 1973 plaintiff shall deposit into the Registry of the Court, ten percent

(10%) [but not more than six hundred dollars ($600.00) in any one month] of its total net revenue from whatever source derived, and without regard to any territorial or geographical limitation. Net revenue means all monies received. The monthly payment as here required to be suitably noted as applying against maintenance.

(c) Plaintiff shall furnish monthly to the defendant a statement of its receipts in terms of its sums in its operation. "Receipts" do not include accounts receivable, but they include monies paid, sums received in the operation of the business. The statement shall be furnished simultaneously with the deposit in the Registry of the Court with copies being forwarded to the defendant.

(d) All supplies shipped by defendant to plaintiff are to be on a COD basis.

3. One the condition that the plaintiff complies from time to time as ordered with the requirements which I have imposed in modification, the restraint implicit in the Preliminary Injunction as of July 13, 1973 shall be abided by the defendant.

4. The described Preliminary Injunctive order remains in full force and effect, except insofar as this order modifies or changes its terms.

5. It is the view of the Court that the injunction as modified shall remain in force for only so long as is necessary to an orderly decision of the cause at which time the

writ is to be vacated, further modified or made permanent as the record may warrant.

6. Plaintiff may at its option deposit with the Clerk, *the monies or funds required by this order by check.*

7. No monies on deposit in the Court's Registry are to be disbursed or otherwise drawn down without written order of the Court after hearing.

8. This order and the Preliminary Injunction referred to from time to time concern only the case styled Response of Carolina, Inc. v. Leasco Response, Inc. The Court does not intend that it affect the (3) other causes which are consolidated therewith.

DONE AND ORDERED at Miami, Florida this 30th day of November, 1973, nunc pro tunc as of 6:21 p.m., Thursday, October 18, 1973.

/s/ C. Clyde Atkins
United States District Judge

cc. Joseph Womack, Esq.
Harold Ward, Esq.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 73-1367-Civ-CA

DATATRON CORPORATION,
a Kentucky corporation,
d/b/a RESPONSE OF LOUISVILLE,
Plaintiff,

vs.

LEASCO RESPONSE, INCORPORATED,
a Delaware corporation; JOHN DOE,
TOM DOE, SAM DOE, and RICHARD DOE,
Defendants.

Filed
Oct 2 3:20 PM '73

PRELIMINARY INJUNCTION WITH FINDINGS AND CONCLUSIONS

THIS CAUSE is before the Court after 14 days notice on the Application of the Plaintiff, DATATRON CORPORATION, a Kentucky corporation, for a provisional and preliminary status quo order enjoining the Defendant, LEASCO RESPONSE, INC., a Delaware corporation, its retainers, agents, employees and others acting in concert with said Defendant from: removing computer equipment, parts or components (hardware) from the possession of the Plaintiff at Louisville, Kentucky or elsewhere; from

harrassment, disturbing or otherwise interfering with or disrupting Plaintiff's business operations; and from refusing to deal with the Plaintiff during the pendency of the litigation.

The action of the Court today implies further inquiry and consideration pendente lite of changes in conditions or circumstances which may warrant the dissolution or modification of this order or the entry of a permanent writ.

The court has prior to its oral ruling from the bench (at approximately 4:25 p.m., Friday, September 21, 1973) and the issuance of this order, considered the pleadings and motions filed; the exhibits and documentary evidence admitted, the pertinent antitrust acts; Section 2283 of the Code; controlling case law; the stipulation of counsel concerning jurisdiction and doing business; Rules 65 and 52(a) among others; the oral testimony of the witnesses at the hearing and argument of counsel for both sides. In consequence, the Court finds and concludes:

First: The Defendant, Leasco, is doing business with the Southern District of Florida.

Second: The Court has jurisdiction of the parties and the cause.

Third: That as to the basic issue of entitlement to relief the equities are with the Plaintiff. This conclusion is reached by the Court with due regard to the quantum and type of evidence required by law to support the entry of restraint orders.

Fourth: Without regard to the pendent jurisdictional counts the Court concludes at this stage that with reference to the antitrust allegations, there is a reasonable probability that the Plaintiff will succeed on the merits of its cause.

Fifth: The granting of the restraint sought will do minimal damage to the Defendant, given the conditions herein imposed by the Court upon the Plaintiff to effectuate the writ.

Sixth: Unless the Defendant is restrained, damage to the Plaintiff will in all liklihood be substantial and irreparable. It is likely that unless the status quo is kept Plaintiff's business will cease to operate.

Seventh: The effectiveness of this order is conditioned upon the Plaintiff doing the following:

A) Within five (5) days Plaintiff shall post with the Clerk of Court a cash or other good and sufficient bond in the amount of $2,500.00.

B) At its next regular monthly "royalty" payment date; Plaintiff shall pay into the registry of the Court 15% (Fifteen) of its total dollar income derived (monies received) from the use of Leasco's mark or equipment.

C) After making the first payment as required by (B) above, Plaintiff shall thereafter and once each month make a similar payment into the registry. The 15% calculation to be made in the manner set out in (D) below. Plaintiff shall have a reasonable time after

the monthly income can be calculated in which to transmit the funds by mail from Louisville, Kentucky to Miami, Florida.

D) In the calculation of its income from sales Plaintiff shall include all monies derived from all sales without regard to territorial or geographical location(s).

D) At the next regular due date mentioned in the Franchise Agreement and its attached exhibits, Plaintiff shall pay into the registry of the Court 10% (Ten) of its total sales derived (monies received) from the use of Leasco's mark or equipment. The same to be considered toward rental as distinguished from "royalty" as contemplated by (B) above.

F) Calculation of the 10% (Ten) required in (E) to be made as in (D) above.

G) After making the first payment as required in (E) above Plaintiff shall thereafter on each succeeding (monthly) anniversary date make a similar payment into the registry. Calculation of the 10% (Ten) to be made as above described in (D) and (E).

H) In the event the calculated 10% (Ten) based on sales income shall exceed the amount set out in the contract the figure contained in the contract shall control.

Eighth: Plaintiff will keep its billing and sales income and payments records in an orderly way or fashion so that

the Court and counsel may inspect them on reasonable notice and as necessary from time to time. Plaintiff is to furnish (periodically) counsel for the Defendant, Leasco, with a copy of such records.

Ninth: Plaintiff will keep current in payments for maintenance performed by the Defendant, Leasco. The Court intends that these payments be made directly by Plaintiff to the Defendant.

Tenth: The disbursement or drawing down of any bond or registry monies described in this order shall be done only under the terms of a written order of Court after hearing.

Eleventh: In the event Plaintiff shall elect to post a cash bond as required by this order, the Clerk shall give a receipt therefor.

The reasons, authorities and conditions imposed considered and the Court being advised in the premises, it is now, thereupon,

ORDERED, ADJUDGED AND DECREED THAT:

The Defendant, LEASCO RESPONSE, INC. its retainers, attorneys, officers, agents, servants, employees and all others in concert or participation with said Defendant to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained until further order of the Court from:

1. Failing or refusing to perform or do any act, deed or thing under any contract or obligation between it and the Plaintiff.

2. Removing any equipment, components or parts (hardware) from the Plaintiff's possession, control, custody or property.

3. From harrassment, interruption, or interferring with Plaintiff, its employees or business operations in any way. The Court also intends that no such acts be done by the Plaintiff toward the Defendant.

4. From refusing within five (5) days to deliver the two drives (described by the witnesses at the hearing) upstairs to the Plaintiff's equipment room. In this connection and in keeping with the Defendant's request, Plaintiff may if it desires cause the drives to be moved from storage to the described location, the Defendant to bear the costs of same.

5. From failing or refusing to properly disconnect the computers components and parts (hardware) now in the possession of the Plaintiff, preparatory to the Plaintiff's move to new premises; such move now contemplated to take place on or about December 1, 1973.

6. From failing or refusing to properly connect and render operational the computers, parts components (hardware) after the Plaintiff has moved to its "new" premises or quarters.

7. From refusing to deal with the Plaintiff or do other business pending the conclusion of the above styled litigation.

DONE and ORDERED at Miami, Florida the 25th day of September 1973 nunc pro tunc as of 4:25 p.m., Friday, September 21, 1973.

/s/ C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 73-1367-Civ-CA

DATATRON CORPORATION,
a Kentucky corporation, d/b/a
RESPONSE OF LOUISVILLE

Plaintiff

v

LEASCO RESPONSE, INCORPORATED,
a Delaware corporation;
JOHN DOE, TOM DOE, SAM DOE and
RICHARD DOE,

Defendants

Filed Nov 30 1973

AMENDED PRELIMINARY INJUNCTION WITH FINDINGS AND CONCLUSIONS

THIS CAUSE has come before the Court on a motion by the Defendant, Leasco Response, Inc. to modify the Preliminary Injunction entered by this Court on September 25, 1973. Upon consideration of the record in this cause and the Court being otherwise duly advised, the Order of September 25 (filed October 2, 1973) is amended to read as follows:

THIS CAUSE is before the Court after 14 days notice on the Application of the Plaintiff, DATATRON CORPORATION, a Kentucky corporation, for a pro-

visional and preliminary status quo order enjoining the defendant, Leasco Response, Inc., a Delaware corporation, its retainers, agents, employees and others acting in concert with said Defendant from: removing computer equipment, parts or components (hardware) from the possession of the Plaintiff at Louisville, Kentucky or elsewhere; from harrassment, disturbing or otherwise interfering with or disrupting Plaintiff's business operations; and from refusing to deal with the Plaintiff during the pendency of the litigation.

The action of the Court today implies further inquiry and consideration pendente lite of changes in conditions or circumstances which may warrant the dissolution or modification of this order or the entry of a permanent writ.

The Court has prior to its oral ruling from the bench (at approximately 4:25 p.m., Friday, September 21, 1973) and the issuance of this order, considered the pleadings and motions filed, the exhibits and documentary evidence admitted, the pertinent antitrust acts; Section 2283 of the Code; controlling case law; the stipulation of counsel concerning jurisdiction and doing business; Rules 65 and 52(a) among others; the oral testimony of the witnesses at the hearing and argument of counsel for both sides. In consequence, the Court finds and concludes:

First: The defendant, Leasco, is doing business with the Southern District of Florida.

Second: The Court has jurisdiction of the parties and the cause.

Third: That as to the basic issue of entitlement to relief the equities are with the Plaintiff. This conclusion is reached by the Court with due regard to the quantum and type of evidence required by law to support the entry of restraint orders.

Fourth: Without regard to the pendent jurisdictional counts the Court concludes at this stage that with reference to the antitrust allegations, there is a reasonable probability that the Plaintiff will succeed on the merits of its cause.

Fifth: The granting of the restraint sought will do minimal damage to the defendant, given the conditions herein imposed by the Court upon the plaintiff to effectuate the writ.

Sixth: Unless the defendant is restrained, damage to the plaintiff will in all likelihood be substantial and irreparable. It is likely that unless the status quo is kept plaintiff's business will cease to operate.

Seventh: The effectiveness of this order is conditioned upon the plaintiff doing the following:

A. Within five days plaintiff shall post with the Clerk of Court a cash or other good and sufficient bond in the amount of $2,500.00.

B. At its next regular monthly "royalty" payment date which for the month of September is the 10th day of October, and on the same day of each month thereafter, plaintiff shall deposit into the Reg-

istry of the Court fifteen percent (15%) of its total net revenue from whatever source derived and without regard to any territorial or geographical limitation. Net revenue means all monies received during the month preceding the month such payment is due. The monthly deposit as described herein shall be suitably noted as applying against the claim of royalty payments.

C. At the next regular due date mentioned in the Franchise Agreement and its attached exhibits, and on the same day of each month thereafter, plaintiff shall pay into the Registry of the Court Ten Percent (10%) of its total net revenue from whatever source derived and without regard to any territorial or geographical limitation. Net revenue means all monies received during the month preceding the month such payment is due. This payment is to be considered toward rental as distinguished from "royalty" as contemplated in "B" supra.

D. In the event the calculated ten percent (10%) based on sales income shall exceed the amount set out in the contract the figure contained in the contract shall control.

Eight: Plaintiff shall furnish monthly to the defendant a statement of its receipts in terms of its sums in its operations. "Receipts" do not include accounts receivable, but they include monies paid, sums received in the operation of the business. The statement shall be furnished simultaneously with the deposit in the Registry of the Court with copies being forwarded to the defendant.

Ninth: Plaintiff will keep current in payments for maintenance performed by the defendant, Leasco. The Court intends that these payments be made directly by plaintiff to the defendant. All supplies shipped by defendant to plaintiff are to be on a COD basis.

Tenth: The disbursement or drawing down of any bond or registry monies described in this order shall be done only under the terms of a written order of Court after hearing.

Eleventh: In the event plaintiff shall elect to post a cash bond as required by this order, the Clerk shall give a receipt therefor.

The reasons, authorities and conditions imposed considered and the Court being advised in the premises, it is now, thereupon,

ORDERED, ADJUDGED AND DECREED THAT:

The defendant, LEASCO RESPONSE, INC. its retainers, attorneys, officers, agents, servants, employees and all others in concert or participation with said defendant to whom notice of this order shall come by personal service or otherwise, be and they are each enjoined and restrained until further order of the Court from:

1. Failing or refusing to perform or do any act, deed or thing under any contract or obligation between it and the plaintiff.

2. Removing any equipment, components or parts (hardware) from the plaintiff's possession, control, custody or property.

3. From harrassment, interruption, or interfering with plaintiff, its employees or business operations in any way. The Court also intends that no such acts be done by the plaintiff toward the defendant.

4. From refusing within five (5) days to deliver the two drives (described by the witnesses at the hearing) upstairs to the plaintiff's equipment room. In this connection and in keeping with the defendant's request, plaintiff may if it desires cause the drives to be moved from storage to the described location the defendant to bear the costs of same.

5. From failing or refusing to properly disconnect the computers components and parts (hardware) now in the possession of the plaintiff, preparatory to the plaintiff's move to new premises; such move now contemplated to take place on or about December 1, 1973.

6. From failing or refusing to properly connect and render operational the computers, parts components (hardware) after the plaintiff has moved to its "new" premises or quarters.

DONE AND ORDERED at Miami, Florida this 30th day of November, 1973, nunc pro tunc as of 4:25 p.m., Friday, September 21, 1973.

/s/ C. Clyde Atkins
United States District Judge

cc. Joseph Womack, Esq.
Harold L. Ward, Esq.